BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD D. LONGHOFER Claimant VS. **ADVANCED ENGINE REBUILDERS, INC.** Respondent AND **FARM BUREAU MUTUAL** **INSURANCE COMPANY, INC.** Insurance Carrier	)	Docket No. 193,037

ORDER

Respondent appeals from an October 19, 1994, Order by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge granted claimant's request for preliminary benefits. The issues raised by respondent on appeal are:

(1) Whether timely notice was given.

(2) Whether the Administrative Law Judge exceeded her jurisdiction by ordering Dr. Estivo as the authorized treating physician rather than giving the respondent the opportunity to provide three (3) names.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On an appeal from a preliminary order, the Appeals Board has jurisdiction to review a finding that claimant failed to give timely notice. K.S.A. 44-534a. This jurisdiction includes authority to determine whether claimant has established just cause for failure to give notice within ten (10) days.

The Appeals Board finds that the claimant failed to give notice within ten (10) days. Notice to a co-worker is not notice to the employer. However, the record does establish that notice was given to the co-owner, claimant's supervisor, within seventy-five (75) days of the accident and that there was just cause for claimant's failure to give notice within ten (10) days.

Claimant suffered accidental injury arising out of and in the course of his employment on or about May 9, 1994. He filed an Application for Hearing on August 24, 1994. Although claimant discussed his injury with a co-worker within a week of the initial incident, he did not advise his supervisor of his injury until he returned from a vacation on or about June 6, 1994. There is some question as to whether or not claimant informed his supervisor that his back condition was work related at that time. However, this became clear within a couple of weeks thereafter during a telephone call from claimant to his supervisor. Following that conversation, the supervisor contacted respondent's workers compensation insurance carrier. An accident report was thereafter caused to be filed with the Division of Workers Compensation on July 1, 1994, reporting a back injury to have allegedly occurred on June 7, 1994.

Claimant's Application for Hearing alleges an accident on approximately May 9, 1994. He testified that he was injured on a Saturday. This would be consistent with an accident date of May 7 rather than May 9, 1994, which was a Monday. However, it was also claimant's testimony that it was unusual for him to be working on a Saturday and that the following Monday would have been his next regular work day. He had been asked by his supervisor, Jeff Oelkers, a co-owner of the company, to come in that Saturday along with the two other people that worked in his department. They were moving the cylinder head area of the shop to another area in order to have more work space. They were moving the stock, lifting and stacking it in another location. On that occasion, he experienced a sharp pain in his back as a result of lifting. He described it as starting out as a sharp pain and then an ache. He continued working and did not report it because he thought it would go away. He treated himself by taking aspirins and continued working until Memorial Day weekend when he took some time off for vacation. During that time his condition worsened and after he got back from vacation he sought medical treatment. He initially saw a chiropractor on June 15 and again on June 20, 1994. On June 28, 1994, his pain was so bad that he could not sleep and had a friend drive him to the hospital. Upon his release from the hospital emergency room, he was given a slip that said no work until seen by Dr. Siwek, an orthopedic surgeon. He has not worked since June 28, 1994, as he was subsequently diagnosed as having a herniated disc at L5-S1. Surgery was recommended by Dr. Siwek. He obtained a second opinion from Dr. Estivo, at the suggestion of his attorney, who also recommended surgery.

Claimant contends that he was unaware of any requirement to report an injury within ten (10) days. He has never before filed for workers compensation benefits. The employer admitted that the company has no written policy concerning injuries occurring at the work place and further admitted that a Form 40 was not posted at the work place, nor was there posted any other notice advising employees what to do in case of injury as required by K.A.R. 51-13-1. Claimant testified that he did not give notice to his employer earlier because he did not understand the severity of his injury. It was common to have aches and pains in the type of work he was doing and he thought that his symptoms would go away. It was not until his symptoms worsened to the point that he sought medical treatment and could no longer work that he discussed filing a claim for workers compensation benefits with his employer. He had earlier advised his employer of his back

condition but did not specifically state that it was due to a work-related accident. He somehow thought his employer was aware of this although it is not clear from the record how the employer was to make the connection before being advised by claimant.

K.S.A. 44-520 provides that a claim is barred where notice is not given within ten (10) days unless the claimant establishes just cause for failure to give ten (10) day notice and notice is given within seventy-five (75) days. In this case, notice was given within seventy-five (75) days. The Appeals Board finds under the facts and circumstances of this case that claimant had just cause for not giving notice earlier. Accordingly, that finding by the Administrative Law Judge is affirmed.

Respondent also challenges the designation by the Administrative Law Judge of Dr. Estivo as authorized health care provider. Respondent argues that the Administrative Law Judge exceeded her jurisdiction by denying respondent the opportunity to provide three (3) names. However, this was not a situation where claimant was seeking a change of authorized health care provider since respondent had never designated a treating physician or otherwise offered to provide medical treatment. Respondent argues that the employer should not lose its right to control medical treatment for exercising in good faith its right to have an Administrative Law Judge rule on an issue going to the compensability of a claim. Granted, this is a legitimate consideration for the Administrative Law Judge when deciding how medical treatment should be provided. However, it does not divest the Administrative Law Judge of authority to make a designation at preliminary hearing where medical treatment has not been provided following a request for same by claimant. We have held in the past that an Administrative Law Judge may designate a treating physician under these circumstances. As such, the Administrative Law Judge has not exceeded her jurisdiction in naming Dr. Estivo as the authorized health care provider in this instance. Accordingly, that issue is not subject to review by the Appeals Board on appeal from a preliminary order.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Order entered by Administrative Law Judge Nelsonna Potts Barnes, dated October 19, 1994, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Phelps, Wichita, KS
Dana D. Preheim, Wichita, KS

Nelsonna Potts Barnes, Administrative Law Judge
George Gomez, Director